IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3935 OF 2007
IN
SUIT NO.2586 OF 1985

The Board of Trustees of
the Port of Mumbai ...Plaintiffs

Versus

M/s.K.Uttamlal Pvt Ltd & Anr. ...Defendants

Shri U.J.Makhija with Ms Preeti Shah i/by Mulla and Mulla for the Plaintiffs.

Shri Vadke i/by M/s.Khaitan and Jayakar for the 1st Defendant in support of Notice of Motion.

Ms N. Sumani i/by Bhatt & Saldanha for the Respondent No.2.

CORAM : ABHAY S.OKA, J.
DATED : NOVEMBER 02nd, 2007.

P.C.:

1. The submissions of the counsel appearing for the parties were heard on the last date. The Notice of Motion has been taken out by the first defendant for setting aside the order dated 05th November, 2003. The prayer is for condoning the delay and for granting permission to the first defendant to file written statement.

2. On 05th November, 2003 this Court passed a decree against the first defendant under Rule 10 of Order VIII of the Code of Civil Procedure, 1908 in the sum of Rs.02,56,000/- with interest on the principal

amount of Rs.02,51.717.71/- at the rate of 12% per annum. On a Notice of Motion taken out by the first defendant by order dated 06th September, 2004 this Court set aside the decree as against the first defendant subject to condition of the first defendant paying costs of Rs.5,000/- to the plaintiffs and subject to first defendant filing written statement within the time of ten days. The order provides that if either of two conditions are not complied with within the stipulated time, the Notice of Motion will stand dismissed. The first Defendant did not comply with the order of payment of costs. The present motion is for extension of time to pay costs and filing written statement.

3. The submission of the learned counsel appearing for the first defendant is that the written statement of the first defendant was prepared in the year 2003 and only due to inadvertence and oversight the same was not filed. He submitted that the first defendant has excellent case on merits and therefore, an opportunity may be given to the first defendant to contest the suit. The learned counsel for the first defendant submitted that the present Notice of Motion may be made absolute subject to the first defendant paying appropriate amount of costs to the plaintiffs. The learned counsel appearing for the plaintiffs submitted that the order dated 06th September, 2004 passed by this Court is a self-operative order and the amount of costs payable

under order dated 06th September, 2004 was only Rs.5,000/- which the first defendant failed to pay till today. He submitted that prayer (a) of this Notice of Motion cannot be granted in view of nature of the order passed on 06th September, 2004.

4. I have heard the submissions. The order dated 06th September, 2004 passed by this Court on Notice of Motion No.2240 of 2004 reads thus:

> "1. This motion is taken out by defendant No.1 for setting aside exparte decree. The contention of Defendant No.1 is that name of their advocate was not shown. The claim involved is about Rs.2,56,000/-. I heard the advocates for the plaintiffs and defendants. This motion is allowed subject to condition that within ten days from today the defendant No.1 will pay costs of Rs.5,000/- to the plaintiffs and will also file written statement. If either of these conditions are not complied with, the order of dismissal stands as it is. This motion is disposed of.
>
> 2. Parties to act upon an ordinary copy of this order duly authenticated by the Court Associate".

5. There is a gross delay on the part of the first defendant as for a period of three years and more the first defendant did not pay costs of Rs.5,000/-. The order dated 06th September, 2004 is a self-operative order.

6. There is hardly any explanation in affidavit in support as to why the sum of Rs.5,000/- was not paid and as to why written statement was not filed in the time stipulated by order dated 06th September, 2004. Therefore, this is not a case where indulgence can be shown to the first defendant.

7. When the Notice of Motion was argued on the last date, the Court made a suggestion to the first defendant that if the first defendant was ready to deposit in this Court a sum of Rs.01,25,000/- without prejudice to the rights and contentions of the first defendant and was ready to pay substantial costs to the plaintiffs, indulgence can be shown to the first defendant. The learned counsel for the first defendant states that the first defendant is in a position to deposit only a sum of Rs.20,000/-.

8. Considering the conduct of the first defendant, no case is made out for granting any relief in this Notice of Motion and the Notice of Motion is accordingly dismissed. The suit shall be set down for "Settlement

of Issues" between the plaintiff and second defendant on 03rd December, 2007.

JUDGE